

1 **Judicial and Attorney Ethics and Social Media:**

IT'S AN ELECTRONIC JUNGLE OUT THERE!

Tara van Brederode, Attorney Disciplinary Board

2 **SOCIAL MEDIA, BLOGS, REVIEW SITES, CONFIDENTIALITY, AND ETHICS**

3 **AREAS OF CONCERN**

- Blogging, tweeting, posting on Facebook
 - About cases
 - About other stuff
- Online “reputation management”
 - Responding to online reviews
- “Friending” and “following” people
 - Clients
 - Judges
 - Opposing counsel
- Fake social media accounts and fake posts

4 **WHO’S DOING THIS STUFF?**

All ages, all generations (Boomers and Gen X appear to be particularly prominent overshareers)

5 **CONFIDENTIALITY ISSUES**

- Rule 32:1.6 – confidentiality
 - Remember, 1.6 is BROADER than attorney-client privilege
 - “The duty of confidentiality extends generally to information related to a representation whatever its source and *without regard to the fact that others may be aware of or have access to such knowledge*.” – ABA Formal Opinion 480, released March 6, 2018: “Confidentiality Obligations for Lawyer Blogging and Other Public Commentary.”
 - Cannot cloak it behind “hypothetical” label or vague language if it is reasonably likely that a 3rd party could determine the identity or situation of the client.
 - When acting in a representative capacity, 1st Amendment free speech rights may be curtailed.
 - DC ethics opinion: don’t let social media sites access all of your contacts! This violates duty of confidentiality

6 **INFLUENCING THE TRIBUNAL**

- Louisiana lawyer Nanine McCool's activities “amounted to a viral campaign to influence and intimidate the judiciary ... by means prohibited by law and through the actions of others,” in violation of Louisiana Rules of Professional Conduct 3.5(a) (attempting to influence judge improperly) and 8.4(a) (violating rules through acts of another).
- AND messages the judges received “constitute prohibited *ex parte* communication,” in contravention of Rules 3.5(b) (improper *ex parte* contacts) and 8.4(a).
- AND the court said McCool breached Rules 8.4(c) (misrepresentation) and 8.4(d) (conduct prejudicial to administration of justice).
- McCool's First Amendment argument failed. She was disbarred.

7 EX PARTE COMMUNICATIONS WITH JUDGES

- Meet Stacy Parks Miller, district attorney for the county that includes State College, PA
- She emailed a judge, his secretary, his law clerk, and defense counsel about a criminal prosecution, trying to get the Court to hold a defendant she believed was not eligible for bail.
- The Judge replied. He did not "reply all."
- Miller replied. She did not copy defense counsel:
 - "Will u rescind that order ... otherwise [h]e will walk out. You have no idea where he will go etc. U don't even have a supervised bail eval!"
- The Judge replied.
- The disciplinary panel found that this was improper *ex parte* communication by Miller.

8 BUT WAIT...IT GETS WORSE!

- Defendant filed a *pro se* petition for writ of mandamus against Miller.
 - Judge set a hearing.
 - Miller emailed the judge:
 - "Are you serious? Scheduling a hearing with me and a pro se inmate ... giving him a teleconference face to face making me report to him?"
 - She cited caselaw.
 - Judge cancelled the hearing.
- Miller text-messed another judge (15 messages in a 50-minute period) the day after trial (only the first 30 characters of each message could be forensically obtained):
 - "You laughed when [pathologist] told..."
 - "You laughed!!"
 - "As part of restitution you should..."

9 AND THERE'S MORE!

- TWO MINUTES AFTER A RAPE-SHIELD HEARING, Miller group text-messed her subordinate AND the Judge (but not defense counsel) about a specific statement made by the subordinate: "...oh he said ..."
 - Miller claimed that she only meant to include the subordinate in the message.
 - The panel found that stating "he said" made it clear that she knew she was including the Judge.
- In a later matter, defense counsel moved to recuse the Judge. The Judge asserted "there are no text messages...I swear to God..."
 - Miller did not correct him.
- In another matter, defense counsel moved to recuse the Judge based on claims of *ex parte* communication between Miller and the Judge.
 - Miller flatly denied that any such communications had ever occurred.

10 RULES IMPLICATED

- Iowa R. Prof'l Conduct 32:3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL
 - A lawyer shall not:
 - (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
 - (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;
- Iowa R. Prof'l Conduct 32:4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

- In the course of representing a client, a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person;
- Iowa R. Prof'l Conduct 32:8.1: BAR ADMISSION AND DISCIPLINARY MATTERS
 - ...[A] lawyer in connection with a ... disciplinary matter, shall not:
 - (a) knowingly make a false statement of material fact;
- Iowa R. Prof'l Conduct Rule 32:8.4: MISCONDUCT
 - It is professional misconduct for a lawyer to: ...
 - (d) engage in conduct that is prejudicial to the administration of justice; ...
 - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

11 **MEET BRITNEY BELLA!**

- May 2011: Miller invents "Britney Bella" on Facebook to "like" establishments suspected of selling bath salts.
 - Miller had previously asked PA state police to make such a page, but they declined.
 - Miller did not seek advisory opinions.
- Miller emailed her staff, encouraging them to "befriend people and snoop...use it freely to masquerade around [F]acebook...use it to befriend defendants or witnesses if you want to snoop." [And they did!]
- When directly asked, Miller said she had not directly communicated with witnesses, "ever."

12 **RULES IMPLICATED**

- Iowa R. Prof'l Conduct 32:4.3: DEALING WITH UNREPRESENTED PERSON
 - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- Iowa R. Prof'l Conduct Rule 32:5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE
 - With respect to a nonlawyer employed or retained by or associated with a lawyer:
 - (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
 - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
 - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

13 **SANCTION**

- February 8, 2019: Former State College, PA, prosecutor, Stacy Parks Miller, is suspended from the practice of law for a year and a day. (Finally reinstated 8/31/21.)

14 **FRIENDING IN DISGUISE & FRIENDING JUDGES**

- A prosecutor acted unethically when he used a fictitious Facebook identity to chat with alibi witnesses in a murder case, the Ohio Supreme Court held (Disciplinary Counsel v. Brockler, 2016)

BL 66525, Ohio, No. 2015-0280, 2/25/16). No public policy exception excuses Ohio prosecutors from the duty of honesty in their own conduct, no matter how good their intentions, the justices said in a *per curiam* opinion.

- The NM Supreme Court has declined to issue a “bright-line ban” on social media use by Judges, but “caution[ed] that ‘friending,’ online postings, and other activity can easily be misconstrued and create an appearance of impropriety....Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement.” (State v. Thomas, 2016 BL 195991, N.M., No. 34,042, 6/20/16).

15 ☐ **SOCIAL MEDIA → TROUBLE (STUDENTS)**

16 ☐ **SOCIAL MEDIA → TROUBLE (PROSECUTORS)**

17 ☐ **SOCIAL MEDIA → TROUBLE (MORE LAWYERS)**

18 ☐ **SOCIAL MEDIA → TROUBLE (MORE LAWYERS)**

- Illinois attorney Drew Quitschau suspended for 6 months in 2018 for:
 - Created false match.com profile for opposing counsel in 17+ contested family law proceedings
 - Registered opposing counsel with Obesity Action Coalition, Pig International, Diabetic Living, and Auto Trader – resulting in many communications received from each
 - Created false reviews on martindale.com and lawyers.com
 - Created false Facebook profile and left reviews of opposing counsel on Facebook
- Quitschau admitted the misconduct after traced to his firm’s IP address (initially denied to law partners though).
- Violations of rule 8.4(c): dishonesty, fraud, deceit, or misrepresentation.

19 ☐ **SOCIAL MEDIA → TROUBLE (JUDGES)**

20 ☐ **SOCIAL MEDIA → TROUBLE (JUDGES)**

21 ☐ **SOCIAL MEDIA → TROUBLE (STILL OVERSHARING)**

22 ☐ **JUDICIAL ELECTIONS**

23 ☐ **SOCIAL MEDIA → TROUBLE (JUDICIAL PERSONNEL)**


24 ☐ **SOCIAL MEDIA → TROUBLE (REGULATORS)**

25 ☐ **ONLINE REPUTATION MANAGEMENT**

26 ☐ **ONLINE REVIEW SITES**

- 2014 Survey by Software Advice, software consulting firm, found:
 - Yelp is (was?) the most popular and trusted site for online reviews (Facebook? Google reviews? Avvo?)
 - 70% of prospective clients would travel further to see an attorney with better online reviews
 - 38% of prospective clients sought out an attorney via internet, compared with 29% asking friends/family
- NO ASTROTURFING (posting fake reviews or inducing others to do so)
 - Violates attorney’s duty of honesty and prohibition against false/misleading advertising
- Can you pay a client for an online review?

- Consensus among states that have issued ethics opinions seems to be “no,” or perhaps “yes” if the payment/discount is disclosed to those reading the review.
- But NY says you can offer a \$50 fee discount for an online review but cannot control the content (distinguishing “rating” from “recommendation.”)
 - Note that NY’s rule differs from the ABA Model Rule (which is Iowa’s rule).
- Iowa R. Prof’l Conduct 32:7.2: Advertising
 - (b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services....

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